Supreme Court, U.S.
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No. 88-212

In The

Supreme Court of the United States

October Term, 1988

Robert W. Hall,

Appellant,

v.

State of Hawaii, University of Hawaii, The William S. Richardson School of Law, Albert J. Simone, Stephen G. Bess, Gladys A. Brandt, Gregory Dela Cruz, Julia Frohlich, Robert M. Fujimoto, James G. Gary, Daniel M. Ishii, Kenneth N. Kato, Stanley Y. Mukai, Walter R. Steiger, Burt S. Tsuchiya, Robin Campaniano, Marvin J. Anderson, Richard S. Miller, Judith M. Kirkendall, William B.C. Chang, Irene Rypinski, Lawrence H. Kam, Bode Uale, Willie Domingo, Dean Kauka, Jeremy T. Harrison, James H. Dannenberg, Ronald C. Brown, and John E. Pickron,

Appellees.

ON APPEAL FROM THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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Mandatory appellate jurisdiction

The basic case for jurisdiction was well argued in the jurisdiction brief and will not be repeated. One jurisdictional point the appellees made is worth discussing.

The appellees argue (Motion to Dismiss or Affirm, p. 15), " . . . appellant's basis for mandatory jurisdiction is at the least doubly flawed, for there is no indication in the record that appellant preserved his appeal to this Court by making the 'explicit and timely insistence,' throughout the state trial court proceedings and on appeal to the state Court of Appeals, that 'a state statute, as applied, is repugnant to the federal Constitution, treaties or laws.' The appellees incorrectly argue that the first time the issue was raised was in the petition for certiorari in the Supreme Court of Hawaii. (*See*, Appellant's Jurisdictional Statement, pp. 6-9 for a detailed listing of the federal issues raised from the filing of the Amended Complaint). The appellant also argued a new, surprise federal issue with regard to federal rights in the certiorari petition that could not have been raised earlier.

A look at the record shows what happened. The state circuit court granted summary judgment on the basis of (Appellee's Motion to Dismiss or Affirm, Appendix, pp. A-3, 4), "the arguments advanced at hearing, the memoranda and evidence filed herein, and the records and previous orders herein and in *Hall v. State of Hawaii*, No. 84-1072 . . . affidavits submitted in connection with the motions" and found that "plaintiff has not sufficiently set forth what admissible evidence giving rise to a genuine issue of fact would be produced by additional discovery" and that "the Amended Complaint fails to state a claim

upon which relief can be granted, and, in any event, within the meaning of Rule 56, Hawaii R. Civ. P., there are no material facts in dispute and Defendants are entitled to judgment as a matter of law."

The Hawaii Intermediate Court of Appeals ("ICA") changed horses in the middle of the stream by simply ignoring the circuit court's findings. The ICA dismissed pursuant to the doctrine of res judicata, a finding not found in the circuit court order (see, Appellant's Jurisdictional Statement, App. 1-19). The appellant properly argued the order on appeal. The Hawaii ICA simply blindsided and bushwhacked the pro se appellant with a surprise basis for dismissal. The first opportunity the appellant had to argue the surprise, unprecedented (in Hawaii as applied) res judicata issue was in the petition for certiorari. The reason for this extraordinary switch is found in the Hawaii ICA decision (App. 17-18). The appellant applied to the law school three successive academic years. The federal court action was filed shortly after the denial of the first application for admission. The later state court action included the denial of admission over three academic years.

The appellant posed a difficult problem to the Hawaii ICA with regard to the second and third academic year applications. The creative solution found by the Hawaii ICA that is the subject of this appeal, was to simply ignore the circuit court order. The Hawaii ICA ignored the fact that the appellant had no choice but to argue the actual judgment on appeal. There was no oral Hawaii ICA argument and no prior clue with regard to the switch. The fact that the litigant was pro se was of no consequence to the Hawaii ICA.

The Hawaii ICA failed to enlighten the appellant as to how he could have pursued his second and third year claims in federal court with regard to events that had not yet happened. The federal district court would have dismissed them anyway on Eleventh Amendment grounds. The Hawaii ICA also failed to show that application of H.R.S. Chapter 91 would not have turned the entire action upside down in favor of the appellant.

By any measure, the Hawaii ICA ran roughshod over the procedural due process and federal right of access to the courts and the Hawaii Supreme Court refused to intervene. The federal district court's Eleventh Amendment dismissal placed a federal burden on the Hawaii courts that has not been discharged according to federal law. The Hawaii courts had original jurisdiction over the state and federal claims involving the second and third academic years, and over the state claims involving the first academic year. No trial was ever held, no discovery was ever allowed, and no court ever made any finding with regard to the H.R.S. Chaper 91 allegation. The Chaper 91 allegation, a key allegation, is in legal limbo.

Res judicata

The appellees would have this court believe that when a state court applies res judicata to a federal case dismissed on jurisdictional grounds, the refusal of state court adjudication is simply an "application of settled preclusion principles" despite the fact that the federal action covers only one academic year while the state action covers three academic years (Appellee's Motion to Dismiss or Confirm, p. 13). The appellant argues that the appellees' position is repugnant to federal law.

Two key issues were not settled in federal district court pursuant to federal law. The first was the issue of the application of state law including Chapter 91, H.R.S., Hawaii Administrative Procedures Act, and the second was the veracity of affiants. The federal district court found that the University of Hawaii was an agency of state government and then dismissed on eleventh amendment grounds without lifting the protective orders.

The appellant alleged in both the state and federal actions that none of the University of Hawaii's admissions rules, regulations and procedures used to deny the appellant admission had ever seen the light of day with regard to the Hawaii mandatory requirement of public notice and hearing prior to lawful adoption and application. The failure of the University of Hawaii School of Law to meet Chapter 91 requirements means that all the admissions rules, regulations and procedures used to deny the appellant admission are null and void pursuant to Chapter 91. Even if every false statement the appellees have told about the appellant were true (and they are not true), the appellees have no lawful rules, regulations and procedures to deny the appellant's applications for admission. The appellees have acted entirely outside of all applicable law. The p. 26 "internal exception" argument is absurd in the absence of proof that Hall was either a state employee or an admitted student. The appellant was neither. Hall was taxpaying citizen on the outside looking in on a very cozy, politicized, discriminatory, admissions process using federal and state funds.

The state administration (the appellees and the Hawaii ICA), the most centralized and powerful state administration in the nation, knew it would lose on the

Chapter 91 issue so the Hawaii ICA chose the only other avenue left open. The Hawaii ICA ignored the facts contained in the appellant's amended complaint, the appellant's affidavits, and the Chapter 91 issue. The Hawaii ICA simply dismissed on procedural grounds. The problem was that there were no procedural grounds so the Hawaii ICA manufactured one that sets an astonishing precedent and happens to run roughshod all over the appellant's federal rights.

Why didn't the appellant appeal the federal appeal decision?

When the appellant analyzed the Ninth Circuit decision it appeared that a case could be made that the state courts had jurisdiction over the state law issues pursuant to recent Supreme Court Eleventh Amendment decisions. That point did not appear to be appealable. Since the state law issues were controlling (particularly the Chapter 91 issue), the state court as a court of general jurisdiction had a subsequent obligation to review on the basis of new evidence, the federal issues in light of a favorable state court decision on the controlling state law issues. The federal court made its findings on the basis of protected affidavits. The findings have no basis at all if and when a favorable decision is made on the state law Chapter 91 issue. One alternative would have been a federal court Rule 60(b) action after a favorable state law determination on the controlling state law issues if the state courts failed to review the federal issues in light of new evidence. A Supreme Court Appeal was not yet ripe since the federal court simply told the appellant to go to state court. The pro se appellant did as he was told.

The appellant could not have foreseen that the state court would find and action dismissed in federal court on jurisdictional grounds subject to the doctrine of res judicata. The correct, timely appeal route open to the appellant is the one now before this court.

When the law is against you, attack the person!

In the absence of a sufficient legal argument, the appellees simply smeared the appellant from the outset of both the state and federal actions and again in this appeal with classic, straight from the gutter character assassination. The appellees know that law school actions are not favored in the state or federal courts so they take the low risk route of simply lying in affidavits over the appellant's strenuous and exhaustive motions and objections. Two of those affidavits were slipped into the appendix of the instant motion (C-26 & C-32). At all times the courts have denied the appellant all discovery or deposition access to any potential witness including all affiants.

There is no legally admissible evidence in the record of either the state or federal action to support any of the claims that the appellant was acquitted for any reason other than the fact that the prosecutor (affiant Mr. Pico) failed to prove any of the charges against the appellant. As proof of the falsity of the affidavits, the appellant filed his acquittal order in both the state and the federal actions. The appellant was acquitted at trial without qualifications or exceptions of any kind. The appellant was acquitted before the last prosecution witness had finished testifying, without the necessity of the appellant or any of his witnesses testifying at trial. Mr. Pico's affidavit is a

sour grapes attempt to re-write history and prejudice this action in the process.

The appellees have never bothered to explain how a clear acquittal of all charges without any exceptions or qualifications whatsoever, acts as a bar to an education under any state or federal law. The way the judicial system actually works, the appellees did not have to explain anything. The shock value of completely unproven allegations was enough to impress every lower court. The appellees hope that the Supreme Court will be similarly impressed. In order to support an appearance of credibility, the appellees quoted from a 1983 Hawaii Supreme Court *preliminary motion appeal decision* (66 Haw. 300 [1983]) that involves statements and allegations which have all subsequently been thrown out of court with the appellant's complete and unqualified acquittal. If the order of acquittal had actually supported any of Mr. Pico's self serving lies, the appellees would have filed a copy of the order with this court; they filed everything else.

The smoothest lie by omission the appellees have told is the one of "pathological intoxication" in the hope that the court will picture the appellant as a hopeless drunk. The 66 Haw. 300 (1983) Supreme Court decision simply gave the appellant the right to defend himself under Hawaii's "pathological intoxication" law on the basis of *sulfite poisoning*. There was never any evidence anywhere that the appellant was intoxicated by alcohol. For some reason the appellees forgot to mention sulfites in their motion. This case is a classic case of not simply kicking a man when he is down, but making certain he will never get up as well.

Additional proof that the appellees persist in lying to by omission is found on App. 27 of the appellant's jurisdictional statement. That page is from the Ninth Circuit's appeal decision where the court found, "He had a grade point average (GPA) of 3.82 . . . " out of 4.00. That GPA figure came right off the appellant's official, undergraduate degree, accredited, certified university transcript introduced into evidence in both the state and federal actions. The appellant earned his undergraduate degree in 1984.

In the alternative to the Chapter 91 argument, the plaintiff addressed each and every allegation with regard to the appellant's personal record in the amended complaint. As an example, the appellees lied by omission by failing to note that the University of Hawaii has a specific, written regulation that precludes the use of courses or grades of courses more than 10 years old for transfer credit. The University of Hawaii turned down an earlier request by the appellant for credit consideration of the appellant's 30 year old courses and grades. The appellees had the gall, however, to use 30 year old courses against the appellant in order to keep the appellant from obtaining an education despite the fact that University regulations prohibit them from doing so. Strange the appellees do not mention this. While the litigation has been crawling forward the appellant has earned a master's degree in counseling psychology successfully completing all his courses the first time around. The appellees have tried desperately to give the impression that the appellant is not bright enough to make it in law school in order to suggest that even if the appellant were to prevail with his appeal, the whole exercise would be a waste of time. The

pleadings and the appellant's affidavits make it clear that the appellant disputes any allegation that he was not numerically qualified for acceptance with or without a favorable Chapter 91 adjudication.

Respecfully submitted,

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